MESSING ADAM & JASMINE

THE LABOR BEAT

Index

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On the Home Front

ANOTHER YEAR, STILL SUPER

Not meaning to repeat ourselves, but we will. We are honored to report that Messing Adam & Jasmine attorneys are listed – again – on the Northern California Super Lawyers list published in July. Gary Messing celebrates fourteen years on the list, Gregg Adam four years, and Jason Jasmine now has three Super Lawyer years after six years as a Rising Star. James Henderson has earned the distinction eight times.

After a rigorous selection process including peer nominations and evaluations combined with independent research – taking peer recognition and professional achievement into consideration – approximately 5% of lawyers in Northern California are selected as Super Lawyers. Rising Stars involves a similar process but limits recipients to those attorneys who are under 40 years of age and/or have been practicing for less than 10 years. No more than 2.5% of the lawyers in the Northern California are selected for this honor.

MAJ attorneys continue to be selected over the years for this prestigious list, and we could not be prouder. Hat's off to Gary, Jason, Gregg, and Jim!

SHOUT OUTS

By Janine Oliker

We are very pleased to introduce three new attorneys who joined our San Francisco office in late 2017 and early 2018: **Wendi Berkowitz**, **Matthew Taylor**, and **Yonatan Moskowitz**. With the new additions, our office was bursting at the seams – literally – and we worked with our landlord to take down the wall separating our suite from the one next door and the one next to that. We are still located in Suite 828 in The Russ Building on Montgomery Street, but once inside the door, it is very much different and still also the same. Stop by if you are in the neighborhood! Our growth spurt was not confined to San Francisco. **Teal Miller** started in June in our Sacramento office.

Wendi is a long-time friend of the firm who came on board on January 1. She left her litigation practice to fight the good fight with us after eleven years at Schiff Hardin LLP (27 years all told between Schiff Hardin LLP and Morgenstein & Jubelirer LLP, the small but mighty litigation boutique that combined with and became the San Francisco office of Schiff Hardin in 2007). Wendi brings to us her extensive complex and high stakes litigation experience, her trial and arbitration savvy, and her careful and meticulous strategizing skill. Before leaving Schiff Hardin, Wendi was a key player in a multi-year, multi-phase fraudulent conveyance case that brought in a $575 million settlement for the plaintiffs. Wendi's wide ranging practice includes decades of experience in employment litigation, counseling, training and investigations, and she has many connections to labor, especially two of our POA clients! When she is not giving her all on behalf of her clients, she can be found traveling the world, eating and cooking gourmet meals, enjoying the great outdoors on a hiking trail, taking (pretty good) amateur photographs, and reading the great (and not-so-great) books.

Matthew joined the team last October, bringing to bear his law enforcement background and legal experience to fight for the firm's clients. He served as a police officer in NYPD's 67th Precinct in East Flatbush, Brooklyn and was a legal intern at the US Attorney's Office in D.C. After starting his legal career in the New York office of a large, corporate law firm, he made his way out West to be closer to family. Over time, he realized that his corporate tax practice was too impersonal for his taste, and he desired a more dynamic career with a strong, human element. He is thrilled to find the perfect fit at Messing Adam & Jasmine, with its focus on working closely with unions and dedicated public sector employees. Outside of the office, Matthew and his wife can be found horsing around with their two toddlers in his neighborhood, Willow Glen, San Jose. He estimates that his kids will let him return to his normal hobbies in about two years.

Yonatan joined the firm in December, having taken some time off after obtaining his law degree from Stanford. Since graduating, Yonatan used his Stanford fellowships to investigate violations of international atrocities abroad and work at a local nonprofit focusing on technology, privacy, and civil rights. He has been active in local and national politics, and spent his law school summers at the U.S. Department of Justice and the Santa Barbara District Attorney's Office. Yonatan is pleased to be applying his commitment to justice to the representation of our clients. When he is not working, you might find him running, playing softball, learning guitar, and traveling whenever possible.

Teal joined the firm in June, bringing to us her passion for representing workers. Teal founded the Employment and Labor Law Student Association at McGeorge and helped establish the Worker's Rights Clinic there. In law school, Teal externed for the Honorable Troy L. Nunley of the U.S. District Court, Eastern District of California and worked as a law clerk at the Bohm Law Group. Since graduating, Teal has honed her litigation skills representing plaintiffs in a variety of employment disputes such as whistleblower retaliation, harassment, and discrimination cases. Teal is excited to apply her litigation and trial experience to represent the clients of Messing Adam & Jasmine. In her off time, Teal likes to adventure on bikes or horseback and explore new places.

Many of you have already spoken or worked with Wendi, Matthew, Yonatan, and Teal. And if not, we hope you will have the opportunity to do so very soon. We also welcome **Kelli Bremer** to the support crew in San Francisco. We

worked with her before and are very happy to have her back on the home team. And **Raul Jacobson** (RHP) is back working in our San Francisco office over the summer and part time in the fall as a law clerk while he attends University of San Francisco School of Law. Raul set the bar high during his brief stint with us as an administrative assistant and is back to hone his research skills working closely with our attorneys.

Fighting the Good Fight

LOCAL 2881 SECURES $4 MILLION IN BACK PAY FOR ACADEMY STUDENTS WHO PERFORMED WORK OUTSIDE PAID HOURS

CAL FIRE Local 2881, the union representing employees of CAL FIRE, entered into an important settlement that will not only result in approximately $4 million in back pay for academy students, but will also significantly impact the working conditions of future academy students. CAL FIRE will issue payments to students who attended a Firefighter or Company Officer Academy going back to November 14, 2013.

CAL FIRE operates two types of academies, the Firefighter Academy (FFA) and the Company Officer Academy (COA), at its training grounds in Ione. Employees who attend either of these academies are assigned a 72-hour work week pursuant to Local 2881's MOU. Under the MOU and the procedures set forth by the Academy Handbook, students work eight "hard hours" beginning at 8:00 a.m. each day, Monday through Friday, followed by eight "soft hours" each day, Monday through Thursday. Historically, the use of the terms "hard hours" and "soft hours" comes from the functions performed by firefighters in stations, where hard hours are spent in active work and soft hours represent the time when employees remain ready to respond to incidents. While attending the Academy, employees are not compensated around the clock. Instead, employees had time off during the evenings from midnight until 8:00 a.m. Under this schedule, Academy attendees are uncompensated between the hours of midnight and 8:00 a.m. During this off time, students slept on Academy grounds, but no contract provision allowed for a limitation on their movement.

In November of 2014, four Company Officer Academies were "locked down" during the two days preceding graduation. In the months preceding the lockdown, there had been a notorious statewide manhunt for former CAL FIRE Academy Battalion Chief Moe Fleming, who was later convicted of second-degree murder in the death of his girlfriend. This security incident, coupled with concerns of academy cadets consuming alcohol in the days preceding graduations, led to this practice of locking down the Academies. These lockdown incidents constituted a change in past practice and resulted in a grievance filed with CAL FIRE and a complaint filed by Local 2881 with the California Public Employment Relations Board (PERB). Ultimately, the PERB complaint was settled between the Union and CAL FIRE and Academy students were issued some back pay to compensate them for the loss of the ability to effectively use those off-duty hours to leave the campus. The Union and CAL FIRE also reached an agreement that the lockdown was not lawful and that such a lockdown would not reoccur.

While investigating the lockdown incident, Local 2881 became aware of pervasive practices in the Academies where students were required to perform work daily beyond their regularly scheduled hard and soft hours. For example, students were required to clean barracks and other common areas, line up, perform group physical training, check and clean engines, attend breakfast in uniform, set up courses for the day, physically move engines to the daily courses, fill the engines with water and gas, attend meetings, take or retake tests, prepare hydration stations, raise the flag, and other various activities prior to the start of their paid time at 8:00 a.m. Students were also held on duty for at least nine hours on Fridays, beyond their regularly scheduled eight hard duty hours.

Attendance at the Academy and passage of the Academy is required for promotion in CAL FIRE. Depending on the job sought, employees are required to attend a specific Academy, either a COA or an FFA, and graduate from the Academy as part of their probationary period to promote. Procedurally, employees are promoted, placed on probation, and then required to pass the Academy as a condition of their probation. Failure to pass the Academy can result in demotion, or the necessity to repeat the entire Academy. Thus, passing either Academy is a "high-stakes" undertaking for all attending employees. This explains why students were not apt to complain, even to the union, about working extra uncompensated hours.

Under the terms of the settlement agreement, CAL FIRE will issue a payment to qualifying individuals who attended an FFA or COA going back to November 14, 2013, a year prior to the filing of the grievance. Individual compensation will be based on various factors, such as pay rate at the time of Academy attendance, the length of the Academy in weeks, the number of Academies the employee attended, and overall days spent in Academy training. For example, those who did not fully complete an Academy will not receive full compensation for the entire Academy.

In sum, nearly 2,400 checks will be issued to qualifying individuals. While the amount will vary, on average, employees will receive over $1,600 per check for a total of approximately $4 million.

The agreement also adjusts Academy practices for the future, redefining hours of hard time and soft time and defining what types of work can be performed during specific

times of the day. These adjustments are limited to students attending the FFA and/or COA and adjustments do not apply to any other employees on a training schedule. Additionally, the agreement changes Academy practices for the foreseeable future (until such time as the new MOU is open for negotiations in 2022).

Once the agreement takes effect, the hours of work for students at FFAs or COAs will be from 7:00 a.m. to 11:00 p.m., Monday through Thursday, and 7:00 a.m. to 3:00 p.m., on Friday. Academy students shall not perform compensable work during their off-duty time (11:00 p.m. to 7:00 a.m.) unless expressly mandated or authorized by CAL FIRE. If CAL FIRE does authorize individuals to perform compensable work on their off-duty time, employees will be compensated for such work.

The agreement defines the following activities as non-compensable work; therefore, these limited activities may be performed without compensation during a student's off duty time: personal hygiene, breakfast, and the raising the flag in the morning. Breakfast will now be voluntary.

Students at FFAs and COAs will still be allowed to continue to voluntarily practice their skills and study during their off-duty time. For example, many students choose to stay and practice skills on weekends. There will be no compensation for the voluntary practice of skills. Additionally, students are still covered by worker's compensation should they be injured while voluntarily practicing.

As a result of the efforts of State Rank-and-File Representative **Tim Edwards**, Local 2881 Chief Counsel **Gary Messing**, and Messing Adam & Jasmine Attorney **Kimberly Chapman**, Local 2881 was able to establish a significant amount of evidence that work was suffered or permitted during off-duty hours, ultimately leading to this settlement totaling approximately $4 million in back-pay compensation. Furthermore, the agreement will significantly improve working conditions for academy students.

"YOU ARE REINSTATED": RICHMOND POLICE CAPTAIN'S TERMINATION OVERTURNED ON APPEAL TO CITY MANAGER

After an accomplished 23-year career as a police captain, the last words one expects to read in a letter from his city manager are "You've been terminated because you are a liar." Yet, that was Captain Mark Gagan's fate laid out in a November 22, 2017 letter from the Richmond, California City Manager. How did Gagan get to this point? And, more importantly, with a family and mortgage, where would he go from here? Gagan's story is both cautionary for officers appearing at administrative interviews and instructive for their representatives preparing and presenting their defense at a *Skelly* hearing and beyond.

In 1994, after graduating the police academy, Gagan began his career with the Richmond Police Department. He worked patrol until 1999, when he was promoted to sergeant. After working for several years as a detective in the family services unit and as a team sergeant working patrol, he was promoted to lieutenant. From 2003 until early 2017, among other assignments, he worked as one of Richmond PD's several Public Information Officers (PIO) whose numbers during that period varied (between three to five officers) as did their duties (lead, administrator, etc.) depending on their rank (sergeant, lieutenant, captain, or assistant chief). The overall purpose of the PIOs is to present a coordinated message to the media and public (through television and print interviews, press releases, social media, etc.) about events involving or relevant to the Richmond PD. During his tenure, Gagan became well-known to reporters as an easily accessible PIO who was guaranteed to provide them clear and accurate information. Perhaps oddly, it was his reputation for accessibility and transparency that became the cornerstone of the Department's charges against him. In 2010, Gagan was promoted to, and served as, captain until he was fired shortly before Thanksgiving 2017.

So, why did his Department brand this well-known, well-liked "Boy Scout" a liar? The real story begins in late October 2016. After a local official reported himself the victim of a robbery, the attending sergeant completed his investigation and drove the official home, rather than allowing the official to drive himself. When his initial report made no mention of why he'd driven the official home, the sergeant was directed to draft a supplemental report. Soon thereafter, in her television news story on the incident, a local reporter alleged that a "source" within the Richmond PD had provided her the supplemental report. The Richmond PD then commenced an internal investigation to uncover "the leak."

Though notice of his May 25, 2017 administrative interview advised that he was a "subject officer" in the PD's investigation of the release of "confidential information," Gagan, assured of his innocence, appeared at his interview without a representative. But he soon found himself woefully unprepared for what would be an almost hour and a half interrogation by his two questioners. In a classic "box him in" strategy, Gagan was repeatedly asked whether he knew the reporter who'd received the report, to which he responded he did not. He was repeatedly asked whether he'd communicated with her, to which he responded he had not. After committing Gagan to his answers, the interviewers then presented him with records from his department phone which showed that there were several one- to two-minute calls from and to what was determined to be the reporter's phone number in February 2016 as well as a five-minute phone call from her in late October 2016 – just days before the reporter referenced the leaked supplemental report in her television report. How could Gagan say he didn't know

the reporter when right there, in black and white, *his own phone records showed he'd communicated with her?*

The interviewers also dug hard into Gagan about the supplemental report. They asked him a multitude of questions: had he ever "seen, read, obtained, given, been asked to give, faxed, etc., etc." the report? All to which he responded he had not. They then produced a database log-in report which showed that only days before the reporter discussed it on television he had logged into the system where the supplemental report was kept. *Why was Gagan in the database?*

By the time he received notice for a second interview – this notice specifically alleging that he had not been truthful and had disclosed confidential information – Gagan wisely asked the Legal Defense Fund to provide him legal representation and **Paul Bird** of MAJ's San Francisco office was assigned his case.

Gagan's second interview on August 30, 2017 consisted mainly of the interviewer going over Gagan's answers from the first interview: "Did you say you don't know the reporter?", "Did you release the supplemental report?", and so on. The interviewer, however, had an additional piece of evidence: a screen shot of a text from the reporter to Richmond's Chief of Police with a date/time stamp of just days before her televised report (and only minutes after her late October 2016 call to Gagan which was reflected in his department telephone records). The start of her text stated "Mark Gagan suggested I contact you directly." If he did not know her, *why did the reporter say that Gagan had told her to text the Chief?*

In its October 11, 2017 notice of Gagan's *Skelly* hearing, the Department advised that it would seek to terminate Gagan on the grounds that he had lied about knowing the reporter and had released the supplemental report "apparently designed to embarrass an elected official." The Department relied on its investigator's 109-page report in which the investigator had sustained these same charges.

At Gagan's *Skelly* hearing, which occurred on November 7, Paul argued that Gagan, who had had contact with innumerable reporters over his 14-year career as a PIO, could not possibly have been expected to remember a reporter he had never met in person and with whom he had only had brief telephone interactions, the last of which occurred almost seven months before his first Administrative Interview in May. Further, Paul argued, the City had failed to establish that Gagan ever had accessed the supplemental report, much less provided it to the reporter. The *Skelly* hearing officer, who was the Chief who had received the text from the reporter, was unmoved and recommended termination with which the City Manager concurred on November 22.

In the months leading up to the April 6, 2018 grievance hearing – delayed several times because of various scheduling conflicts – Paul and Gagan scoured the record and racked their brains to figure out how to convince the City Manager to change his mind, and go against his own disciplinary system, to reinstate Gagan as a Richmond police captain. How does one defend a client who has stated in his interview that he does not know a reporter only to have the interviewer produce phone records and a text message that suggest the opposite?

First, how could they explain why the reporter would have made several calls to Gagan in February 2016? In reviewing the time frame, Gagan noted that the reporter's calls coincided with the off-duty murder of Richmond police officer Gus Vegas. During that time, he had sent an e-mail to another PIO stating that certain information regarding a memorial fund for Vegas should be provided to reporters, one of whom was the reporter in question. Paul searched the internet for news reports about the Vegas murder, found only one that quoted Gagan and noted that it was not the same reporter who later obtained the supplemental report. He also found that the reporter in question had quoted other Richmond officers about the murder, but did not quote Gagan. Finally, Paul found that she – and reporters from other outlets – had used the memorial fund information that Gagan had directed be disseminated to her and the other reporters. Thus at the grievance hearing Paul argued to the City Manager that Gagan's contact with the reporter in February 2016 was so incidental that it was reasonable for him not to have remembered it.

Yet, if Gagan doesn't know her, how could he explain why, just days before her on air report referencing the supplemental report, phone records reflect she called Gagan for five minutes and then immediately texted the Chief? In her text to the Chief, after she introduced herself and said "Mark Gagan suggested I contact you directly," the reporter specifically asked the Chief "Can you please confirm the city manager overturned initial discipline for 3 officers who have now been notices (sic) of intent to terminate?" Paul again searched the internet and found that the reporter had published an online story about the discipline of three officers on the same date that she called Gagan and texted the Chief. Therefore, he argued, the reporter was, in fact, contacting Gagan and the Chief about the discipline of the three officers – about which she then wrote her story – and *not about the supplemental report.*

Even so, why would she say in her text to the Chief that Gagan had directed her to contact him? Gagan searched his records and found e-mails from early 2016 in which the Assistant Chief had directed Gagan and others on the command staff to send all reporters' queries about the discipline story to either the Chief or her. Gagan then also found multiple e-mails from 2016 in which he had, in fact, directed queries from other reporters about the discipline story to

the Chief. So, Paul argued, Gagan was simply doing as he was told to do, which the reporter stated in her text, and that was to refer to the Chief any reporters who asked about the discipline story.

But wasn't five minutes a long time to be on phone with the reporter? How could Gagan not remember a five-minute call? They looked again at Gagan's department phone records and found that it identified him taking a second call from a *different person less than five minutes after the time* the records said the reporter had called him. So, Paul argued, he had actually spoken to the reporter for a period of time that was less than five minutes as the records simply reflected what must have been a minimum billing of five minutes for the reporter's call.

Fine, but how does Gagan explain why he accessed the database just days before the reporter discussed the supplemental report on air? From the investigator's interview with the records clerk, who finalized and uploaded the supplemental report to the database, they knew that Richmond's database, at the time, would not show what specific document a person viewed and whether they downloaded it. So Gagan and his attorney knew that there was no record that Gagan had viewed the report, but there also was no record that he had not. This still left them to explain why he accessed the database. The database contained more than supplemental reports, it contained contact information for parties who have been involved in various actions, among other information. Gagan reviewed his notes from the command staff meeting, held just prior to the date he accessed the database, and found that the Chief had directed him to ensure the address of a party in the previously mentioned officers' discipline case was flagged in the system. The Chief wanted to alert officers to follow certain procedures if called to that address. As the Chief did not provide the specific address, Gagan believed he may have accessed the system to get the party's correct address to provide to a dispatcher to flag. They then obtained an audio recording from February of 2017 made by the Department of Gagan calling the dispatching center to follow up and ensure that his previous flag request had been instituted. This, Paul argued, showed it was entirely reasonable to believe that the reason Gagan had accessed the database days before the reporter obtained the supplemental report was simply to obtain the party's correct address to then provide to dispatch to flag as he had been directed to do.

Ok: but, if not from Gagan, could he offer any plausible explanation as to who could have provided the reporter the supplemental report? Gagan noted that the records clerk had stated that once she uploaded the supplement report to the system she also e-mailed it to the robbery and homicide unit and, once e-mailed, "there's no way to track where it goes." Therefore, once she e-mailed it to the unit, anyone with access to the unit's e-mail address had access to the report and could review and forward it without being traced. Paul had to wonder, had any of those people been interviewed?

He then requested that the Department produce all recordings or transcripts of all witnesses that the investigator had interviewed which the City had not previously provided to them. The Department had already produced audio for all sixteen of the witnesses the investigator had identified in his report that he had interviewed or attempted to interview (through her attorney, the reporter had invoked her privilege not to identify her source). But, pursuant to Paul's request, the Department produced four recordings of interviews of witnesses which, surprisingly, the investigator had not identified in his report. Even more surprising, one of the witnesses (1) was a member of the robbery and homicide unit, (2) admitted that he was contemporaneously aware of the incident involving the city official as well as the drafting and content of the finalized supplemental report, (3) admitted that he did not care for the city official, and (4) admitted that he often had called the reporter, albeit not on a Department phone. Thus, Paul argued, there was at least one individual who, unlike Gagan, had an actual motive to "embarrass an elected official."

On April 6, over a three-hour period, Paul presented Gagan's case to the City Manager.

And then they waited.

On May 2 City Manager Bill Lindsay let Gagan know by letter that, after considering the presentation, it was his finding that Gagan (1) had not lied and (2) had not released the report to the reporter. Further, he ordered that Gagan be reinstated as a captain with the Richmond Police Department "as soon as reasonably possible."

Upon learning that the City Manager had overturned his termination, Captain Gagan expressed his extreme gratitude that Paul was able to represent him and to the Legal Defense Fund for allowing MAJto do so.

Gagan was very fortunate to have Mr. Lindsay hear his appeal and reconsider the termination decision. It would have been very easy for him to politely listen to the presentation, nod his head in agreement, and then, once the parties had left, simply rubber-stamp the termination. But he listened intently, asked pertinent questions that showed he understood the issues, and then objectively evaluated the evidence to mark the hard decision to go against the decision that had been recommended to him by Richmond's disciplinary system.

Sometimes Boy Scouts win.

[Also published in PORAC Law Enforcement News.]

UPDATE ON FLSA LITIGATION

MAJ continues to rack up successes in its Fair Labor Standards Act ("FLSA") litigation.

Recently MAJ attorneys **Gary Messing** and **Paul Bird** settled the matter of *Evan Alder, et al. v. County of Yolo* (E.D. CA) Case No. 2:16-cv-01682-VC for over $200,000. In this case, plaintiffs contended that Yolo County had miscalculated their regular rate of pay by failing to include as compensation amounts paid both as cash in lieu of medical benefits (as required by the Ninth Circuit in the case of *Flores v. City of San Gabriel* (9th Cir. 2016) 824 F.3d 890) and as health insurance premiums to third parties. Settlement of the matter brought a benefit to over 1,000 Yolo County employees as the County has changed its method of calculating their pay going forward.

Further, MAJ attorney **Paul Bird** won on a motion for summary judgment in of *Miles Lewis, et al. v. County of Colusa* (E.D. CA) Case No. 2:16-CV-01745-VC., The court found that Colusa County improperly failed to include its payment of holiday in lieu pay in the calculation of certain members of the Deputy Sheriffs Association's regular rate of pay.

We anticipate reporting on more wins in future Labor Beats.

LOCAL 2881 WINS ATTORNEYS' FEES IN RIGHT TO REPRESENTATION CASE UNDER PRIVATE ATTORNEY GENERAL STATUTE

The Riverside County Superior Court ordered the County of Riverside to pay the attorneys' fees of a CAL FIRE Local 2881 (L2881) member who was denied the representative of his choice at an administrative hearing. The firefighter member appeared with his non-attorney union representative at the hearing, but the administrative law judge excluded him, finding that representation at an administrative hearing constitutes the practice of law. The firefighter was forced to proceed at the hearing representing himself.

When the County issued a finding against the firefighter on the underlying case, L2881 sought judicial review on the grounds that the firefighter was denied a fair trial when he was prohibited from having the representative of his choice. L2881 assigned **Lina Balciunas Cockrell** from MAJ's Sacramento office to file the case in Superior Court and represent the firefighter and L2881 throughout the proceedings. The Superior Court agreed, vacated the County's decision against the firefighter, and remanded the matter for a new hearing, where the firefighter could have the representative of his choice.

L2881 then filed a motion to recover its attorneys' fees pursuant to Code of Civil Procedure section 1021.5, colloquially known as the "Private Attorney General Statute." This statute awards fees to a "successful" party in a civil action which results in the enforcement of an important right affecting the public interest. The doctrine is based on the theory that privately initiated lawsuits are often necessary to enforce public policies.

The Court granted the Motion, almost in its entirety and ordered the County to pay nearly $31,000 in attorneys' fees. The Court found that the Superior Court case resulted in a significant benefit being conferred on a large class of persons because going forward, there is a clear ruling that public safety licensees at CAL FIRE and other agencies are entitled to non-attorney representation at administrative hearings. The Court found that the firefighter incurred significant attorneys' fees in vindicating this important right and he had no financial gain in pursuing the Superior Court case. Therefore, the Court concluded that an attorneys' fees award under the Private Attorney General Statute was appropriate.

WORKING AFTER RETIREMENT AND OTHER RETIREMENT BENEFITS PROBLEMS WE CAN HELP WITH

Are you a retired public employee and still working? There are rules regulating your retirement benefits that you might not know about, and they can run you into trouble. **Steve Kaiser**, who works out of MAJ's Sacramento office, might be able to help. Steve has been practicing for over 35 years and is well versed in handling pension problems. So if you run into trouble, give him a call as John did.

John was a deputy in the Shasta County Sheriff's Office. After suffering a couple of serious injuries on the job, his shoulder gave out and he applied for disability retirement from CalPERS, which was granted in 1999. John was not really ready to retire and needed to supplement his income anyway, so he looked around for work.

He found out that Shasta County had a special position for which his experience was well suited. The County Board of Supervisors had adopted an ordinance to try to curb excessive smoking, an ongoing problem particularly among its youth. For several years, it had operated a program utilizing a retired deputy sheriff to patrol various places where there was a high population of smokers to pass out information while talking to them to try to persuade them to stop. The retired deputy was paid as an independent contractor because there was no supervisor or staff for the program, although a County staff member met with the deputy to be sure that his efforts were directed toward the goals of the program.

In 2002, John took over the program for the other retired deputy. Concerned that he might run into trouble with

CalPERS for working while also collecting pension benefits, he asked several County employees, including some at the upper levels, whether this job could be a retirement problem, and they reassured him that it was fine since he was an independent contractor.

Years later, CalPERS audited this arrangement and in 2012 contacted the County and John for information. The County went to great lengths to explain. To everyone's consternation, CalPERS notified John in 2013 that his job was in violation of the prohibition against working after retirement for a CalPERS agency; i.e. the County. He and the County protested, but in 2015 he was told that he would have to reimburse CalPERS about $350,000.00! Since he had been living off his retirement benefits for well over a decade, he of course did not have even close to enough money to pay it back to CalPERS. Fortunately he contacted Steve for assistance.

On John's behalf, Steve filed an appeal with CalPERS in 2015 but the hearing was not set for another year. Meanwhile, John had to stop his work with the County to keep his damages from building.

Steve maintained contact with CalPERS legal staff. Persistence paid off, and the week before the hearing CalPERS attorney contacted him and said they had changed the determination, due in large part to his persistence on behalf of John who, needless to say, was very grateful.

Another client, Nancy, filed a claim with the Department of Fair Employment and Housing against her employer, a Department for the State of California, for pay discrimination. Two months later, she realized a personal goal and retired. After intense but very quick negotiations, her attorney was able to obtain a settlement which included a settlement agreement that spelled out the calculation of the back pay to be paid to Nancy. It also stated, as all State settlements do, that the Department did not admit liability and that the Department made no representation as to whether the back pay would be recognized by CalPERS.

Surprisingly, CalPERS denied the augmentation of Nancy's retirement benefits. In its decision it stated that the settlement appeared to be a variety of "retirement gift" that is occasionally seen, where a retiring official's final pay is augmented for the purpose of raising pension benefits. CalPERS views this, by statute, as false compensation – i.e. money which was not given as compensation for work performed. CalPERS staff applied this principle to Nancy's settlement payout, even though it was the result of actual discrimination litigation.

Steve filed an appeal on Nancy's behalf, and, again on the eve of the hearing, he persuaded CalPERS to reverse its determination. Like John, Nancy was relieved and excited since, again like John, she had been counting on her augmented retirement in making her plans for years to come.

Working after retirement can come in many different forms, and another kind came to Steve. Soon after retiring, Juan obtained a job with a law firm as a consultant. The firm had a contract with the State Department where Juan had worked and the firm needed the expertise Juan had accumulated as an employee in that State department. Juan wrote to CalPERS for a determination as to whether the job, as put together by the law firm and the State Department, would violate the rules about working after retirement. CalPERS staff began an investigation which got stalled internally for a year and a half.

Juan repeatedly asked for the results but they did not come, and so began working (after being told early on by a CalPERS employee that the arrangement seemed fine). At long last, CalPERS issued a determination letter stating that Juan's actual duties constituted duties being performed as an employee for his former employer, which resulted in an assessment of nearly $100,000. This after he had sought that determination pro-actively from CalPERS! Juan contacted Steve for assistance.

This case involved a fair bit of work, but eventually Steve was able to obtain a very favorable settlement for our client. CalPERS again reversed its determination on the basis that it had overly delayed answering Juan's legitimate question and led him into the problem. It waived reimbursement of the retirement benefits completely.

CalPERS makes mistakes. The mistaken determinations above were made by staff and resulted in a great deal of worry by our clients. Steve, and the entire MAJ law firm, are proud to be able to help. We have experience in these matters that can result in a favorable outcome. If you think you have received an incorrect determination of your retirement benefits, at PERS or elsewhere, please contact us. We can help.

In the News

JANUS V. AFSCME: TAKING THEIR BEST SHOT AND STILL STANDING

By Gary Messing, Gregg Adam, and Yonatan Moskowitz

In a majority opinion by Justice Samuel Alito, the U.S. Supreme Court ruled in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* that "fair share fees" or "agency fees" are unconstitutional violations of the First Amendment. As we predicted in our March article in these pages, the long knives finally caught up to the Supreme Court's earlier 1977 decision, *Abood v. Detroit Board of Education*. Our firm, along with the Stanford Law School Supreme Court Litigation Clinic, organized an amicus brief in

support of the respondent union in the case, AFSCME, on behalf of PORAC and a coalition of fourteen other public safety unions and associations representing approximately 500,000 individuals.

The decision came down on June 27, 2018, the last day of the U.S. Supreme Court's 2017-2018 term, and the same day Justice Anthony Kennedy announced his retirement.

In *Janus*, the Court set aside the value of leaving settled precedent alone and overruled the 41-year old *Abood*, which had permitted unions to collect fair share fees from non-members. These collections were calculated to reimburse the union for its costs in pursuing (legally mandated) activities of collective bargaining, managing grievances, and ensuring that contractual terms favorable to employees were enforced—activities undertaken for all employees regardless of union membership. Non-members already had the right to opt out of paying for the union's political activities, but the Court held that this compromise was insufficient, as fair share fees still infringe on the First Amendment rights of non-members.

The Court reasoned that the First Amendment protects employees from being required to "subsidize" any union activity whatsoever, because such activity is inherently political—it involves, for example, how much money will be spent on salary for public employees, how tenure rules work, which employees are rewarded for what reason, and by which criteria tasks are distributed among workers. Justice Alito's opinion views these inherently political union activities as "compelled" speech on matters of important public concern. "Compelled" speech is heavily disfavored, so the public policy the law was designed to further had to be very important.

According to Justice Alito's opinion, it wasn't. He rejected policy justifications for fair share fees that had arisen since *Abood*, and focused exclusively on the two proposed governmental interests that had been put forward in *Abood* itself: promoting "labor peace" and avoiding the "free rider" problem.

With respect to the first, the Court held that events since *Abood* have shown that fair share fees are not necessary to achieve "labor peace." "Labor peace" is essentially a conceptual basket that includes all of the negative, counterproductive consequences that can arise when labor unions compete against each other for the opportunity to represent individuals who make up a particular labor force. Justice Alito identified examples from the federal government and "right to work" states in which "fair share" fees were not required, but very little breaches of "labor peace" arose. In those instances, he noted, unions were still serving well as the effective exclusive representatives for federal employees and many "right to work" state employees. Therefore, the Court reasoned, there were less restrictive ways than "fair share fees" to further the state's interest in "labor peace."

Regarding the second governmental interest, the Court rejected the idea that the obvious "free rider" problem was a "compelling state interest" as would be required under the relevant First Amendment analysis. This explicit rejection of any sort of "free rider" argument is significant, especially because the majority could easily have written an opinion that allowed states and local governments to more easily avoid a 'vicious circle' of membership attrition (fewer members means they must contribute more to maintain union services at same level, increasing the marginal cost of being a union member, which increases attrition, which further increases dues, etc.). The opinion appears to foreclose even the potential for a legislature to pass, for example, a law giving employees the option of sending the entirety of the money deducted from their paycheck either to the union (as membership dues) or to a nonprofit of their choice.

Unions and state and local governments are already dealing with the immediate practical effects of this decision, which include determining the exact division of responsibilities among unions, employers, and members after a member indicates that they would like to begin the process of refusing to pay their dues. All union leaders should be in contact with their counsel and their employer representatives to negotiate a process that is legal, un-coerced, and as union-friendly as possible. Most contracts have "savings" or "severability" clauses that give unions an opportunity to negotiate lawful replacement provisions.

Also, many unions' existing maintenance-of-membership clauses will likely remain enforceable. These clauses, which have been found reasonable by reviewing courts, require members who voluntarily joined the union to remain members until a defined window period, which comes around either annually or at the end of the memorandum of understanding. However, as new hires attend employer orientations and memoranda of understanding come up for renewal, we expect unions to undertake a more active role in presenting to new employees and existing members alike the benefits of union membership.

So, the door is slammed shut on fair share fees. What happens now?

We regroup and fight back.

Unions all over the country are responding by recalculating their budgets, tightening their belts, and demonstrating more aggressively to their members the value of membership.

In California, through Assembly Bill 119, the legislature and governor have given unions the opportunity to present the value of their membership to new employees before the well is poisoned against them. These new laws (passed in preparation for the *Janus* decision) permit unions to attend new employee orientation in order to present their case for

union membership directly, and restrict employers from communicating pro or con stances on union membership to employees. Other laws may be necessary to ensure that state and local government entities are sitting across the table from robust and strong negotiating partners.

California, given its rich history of supporting labor organizing, is likely to be one of the few that takes this responsibility to public employees seriously. There will likely be significant legislative and administrative action taken to serve as a bulwark against any negative effects of the *Janus* decision.

Nevertheless, this was undoubtedly a blow to all of organized labor, including police unions. The erosion of non-safety unions' strength will adversely affect wages and working conditions over time, and will undermine the political strength of all unions on issues of common importance.

Opponents of unions will see *Janus* as an opportunity to drive a wedge between these unions and their members, particularly by trying to play to the conservative bona fides of many individual members. Police unions will therefore need to raise their game in order to remind their members why solidarity and collective actions matter on bread and butter issues like wages and working conditions.

[Also published in PORAC Law Enforcement News.]

POLICE BODYCAMS MAKE LITTLE DIFFERENCE ON USE OF FORCE, NEW ABA JOURNAL STUDY SAYS

By Matthew Taylor

As reported in an October 2017 article in the American Bar Association, a major, two-year study of body worn cameras ("BWCs") reveals that their use has "no detectable, meaningful effect" on documented uses of force or civilian complaints. The study was conducted by the Metropolitan Police Department ("MPD"), which serves Washington, DC, in partnership with The Lab @ DC, a team of applied scientists based out of Washington, DC's Office of the City Administrator.

The study included 2,200 MPD officers (out of a total force of 3,800 officers) making it "one of the largest and most rigorous studies" on the effect of BWCs to date. As reported on The Lab @ DC's website, the study's methodology was shared with the public (including other scientists, the criminal justice community at large, high school and college students, and advocacy groups) and thus open to comment before the study commenced. Such efforts were intended to insure transparency and freedom from bias.

Ultimately, the study revealed that use of BWCs has "no detectable, meaningful effect" on documented uses of force or civilian complaints. This result is consistent with a 2015 report by George Mason University's Center for Evidence-Based Crime Policy, which found that there were "significant gaps in our knowledge" regarding the impact of BWCs.

Yet, the MPD study conflicts with two other studies, one by the Orlando Police Department in Florida and another by the Rialto Police Department in California. In the case of the former, the Orlando police's yearlong study found that BWCs had a "significant impact" on use of force and civilian complaints making them "an effective tool to reduce response to resistance incidents and complaints." In the latter, the Rialto Police Department found that among officers who were wearing cameras in 2012, use-of-force incidents fell 59 percent and complaints against officers fell 87 percent.

Around the State

POBR'S ONE-YEAR STATUTE OF LIMITATIONS ON DISCIPLINE IS CLARIFIED

By Wendi Berkowitz

One of POBR's most significant protections is the limitation on a public agency's ability to impose discipline on a peace officer more than one year after "a person authorized to initiate an investigation discovers, or through the use of reasonable diligence should have discovered, the allegation of misconduct." Cal. Gov. Code §3304(d)(1). But who is a "person authorized to initiate an investigation"? Is it only the Internal Affairs investigator? Is it the Chief? Is it the City Manager or County Executive? Is it any of these individuals? Or is the definition more expansive, including a wider range of supervisory personnel? Does the statute of limitations begin to run only when an Internal Affairs investigation is officially authorized, or does the clock start ticking earlier?

The Court of Appeal, Fifth Appellate District, has just weighed in on the subject in *Ochoa v. County of Kern* (2018) 22 Cal.App.5th 235. In *Ochoa*, the court concluded that the sergeant who learned of the alleged misconduct by a sheriff's deputy and who started fact-finding to "determine what the nature of the complaint was" fit within the POBR definition of a "personal authorized to initiate an investigation," even though the sergeant was not the Internal Affairs investigator and even though his fact-finding occurred before the official Internal Affairs investigation was authorized. The sergeant testified that: (1) he had no authority to initiate an internal affairs investigation but (2) he did have the "ability to investigate subordinates" and "discipline [them] for [policies and procedures] violation[s]," though he "would not impose any discipline beyond a written reprimand." Further testimony demonstrated that per policy, no one below the rank of a Chief Deputy could authorize an Internal Affairs investigation. In reaching its decision, the *Ochoa* court found it significant that although someone at the rank of sergeant was not authorized to launch an Internal Affairs

investigation, a sergeant was "authorized to initiate some sort of inquiry into a subordinate's alleged wrongdoing." So, the question the Court had to decide was whether that fact-finding inquiry rose to the level of an "investigation" under Section 3304(d)(1). The Court examined the legislative intent behind Section 3304, and considered in particular that POBR's protections apply where the investigation (whatever its definition) *could* lead to potential punitive action. Since the sergeant in this case had disciplinary power, even if limited to, at maximum, a written reprimand, the one-year statute of limitations protection in POBR was triggered. Although the outcome in this case ultimately did not favor the deputy sheriff (because of tolling due to an ongoing criminal investigation), the opinion offers much-needed clarity on when the one-year period for imposing discipline begins to run, and requires the public agency investigating an officer to act much more promptly than it might otherwise have thought before the *Ochoa* court ruled. The decision also applies to firefighters under the Firefighters Procedural Bill of Rights Act, which has the same language as POBR in this regard.

RIVERSIDE COUNTY MUST NEGOTIATE WITH UNION OVER THE IMPACTS OF AUTOMATIC VEHICLE LOCATOR SYSTEM INSTALLED IN POLICE CARS

By Matthew Taylor

Riverside County unilaterally adopted the use of the automated vehicle locator (AVL) system for sheriff's department vehicles, which provides real-time information about the course, velocity, and location of a department vehicle. In response, the union representing sheriff deputies took the County to task for failing to meet and confer over the AVL's implementation. *See Riverside Sheriffs' Association v. County of Riverside* (2017) 42 PERC ¶ 35.

An administrative judge under PERB authority decided in favor of the union. While the decision to implement the AVL may not be negotiable under California law, the County had a duty to meet and confer over the **effects or impacts** of its implementation on employee wages, hours and working conditions. The administrative judge found that the AVL system could potentially be used to assess employee conduct, whether it be for evaluation or formal discipline purposes, and that it raised concerns over employee training. The administrative judge gave short shrift to the County's defensive argument that employee monitoring was not the primary purpose of the AVL, which is to assist in law enforcement use. The administrative judge further stated that the existence of the AVL's uses for crime prevention "does not excuse the County from negotiating with the [union] over the effects of that the new system on [employees]."

PUNITIVE ACTION: FFBOR'S REFERENCE TO "FIRE CHIEF" MEANS ONLY THE JURISDICTION'S "LEAD" FIRE CHIEF

By Paul Bird

Does the Firefighters Procedural Bill of Rights Act's ("FFBOR") procedure for removing a "fire chief" from duty apply to every fire chief in a jurisdiction? No, the method applies only to the jurisdiction's lead fire chief, according to a recent Court of Appeal decision.

After San Bernardino County Fire Protection District's Fire Chief Mark Hartwig terminated division fire chief George Corley's employment, Corley brought an action for age discrimination against the District. When Corley prevailed on his claims at a jury trial, the District appealed. Among other contentions, the District claimed the trial court failed to instruct the jury that FFBOR justified Corley's termination.

The Court looked at Government Code Section 3254(c) which addresses the punitive action employers may take against fire chiefs. Finding that the section does not set out specific classifications of chiefs (such as "division," "deputy," or "assistant") and that FFBOR does not define the term "fire chief," the Court determined section 3254(c) applies only to the lead fire chief position. (Read the ruling at *George Corley v. San Bernardino County Fire Protection District* (2018) 21 Cal.App.5th 390.) The Court noted that FFBOR was modeled after the Public Safety Officers Bill of Rights Act ("POBR") and that in 2011 the Court had interpreted a similar section from POBR to apply solely to a jurisdiction's Chief of Police. (See the case of *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368.)

The Court found no legal error and affirmed the trial court judgment in favor of Corley for more than $700,000 in damages ($544,000 for past lost earnings and $160,000 for future lost earnings).

COURT OF APPEAL FINDS THAT ADMINISTRATIVE LEAVE MAY CONSTITUTE ADVERSE EMPLOYMENT ACTION

By Lina Balciunas Cockrell

In the case of *Whitehall v. County of San Bernardino,* 17 Cal.App.5th 352 (2017), the Court of Appeal concluded that, depending on the circumstances, being placed on administrative leave may constitute an adverse employment action, even if there is no loss of pay or benefits. The plaintiff, a county social worker, had reported the department withholding evidence regarding a child welfare case. The department had fired the case's original social worker for allegedly exaggerating the conditions of the house at issue. Six days after plaintiff, along with the fired social worker and

another social worker filed a motion to inform the juvenile court that the department had perpetrated a fraud upon the court, the department placed plaintiff on administrative leave for two months. The asserted reason for the administrative leave was to initiate an internal investigation regarding plaintiff's potential violation of county rules and policies barring the disclosure of confidential information to unauthorized persons. The county decided to terminate plaintiff for violating the confidentiality policy, but plaintiff resigned to avoid being fired.

Plaintiff subsequently brought a whistleblower and retaliation action against the county. The county responded by filing a special motion to strike the complaint as a strategic lawsuit against public participation (the "anti-SLAPP statute") arising from protected petitioning activity. To defend against that motion, plaintiff had to show a probability of prevailing on the merits of her complaint, and the county argued, among other things, that plaintiff had not suffered an adverse employment action because she had remained on paid administrative leave with full salary and benefits until she voluntarily resigned.

The trial court denied the county's motion, finding that, under the circumstances, plaintiff being placed on administrative leave constituted an adverse employment action. The county appealed. Upholding the trial court's decision on appeal, the court noted that the county's action in placing plaintiff on administrative leave must be viewed in context and here, the leave coincided with the firing of the original social worker assigned to the case and resulted in the county's intention to fire plaintiff. The court also noted that the plaintiff did not request the administrative leave, nor was the leave intended as a reward or accommodation to plaintiff, given that the stated purpose of the leave was to investigate plaintiff's alleged wrongdoing. This could turn out to be key language in supporting an argument that any administrative leave pending investigation (and particularly resulting in a decision to impose discipline) would constitute an adverse employment action.

PUBLIC EMPLOYEES HAVE A PRIVACY RIGHT IN OFF-DUTY SEXUAL RELATIONS THAT HAVE NO IMPACT ON THEIR JOB PERFORMANCE

By Kimberly Chapman

The Ninth Circuit in *Perez v. City of Roseville* (9th Cir. 2018) 882 F.3d 843, recently held that a public employee has a federal constitutional privacy right not to be fired from a job because of an extramarital affair with a co-worker. This ruling is in contrast with other rulings in the Fifth and Tenth Federal Circuits. The wife of a male officer filed a citizen complaint against a female officer, Perez, for having an on-duty sexual relationship with the complainant's husband. The investigation failed to uncover facts that would indicate the sexual relationship occurred on-duty. However, there were possible violations of department rules governing phone-use and texting on duty. Perez was terminated.

Ms. Perez filed an action alleging constitutional violations for violation of her rights to privacy and freedom of association, her right to procedural due process, and claims of sex discrimination under both federal and California law. Perez was given varying reasons for her dismissal. The 9th Circuit Court of Appeals held that there was enough evidence to show that Perez may have been terminated for the affair, which was perceived by some members of the department as an immoral act. The court felt that she had enough evidence to argue that the reasons she was given for her termination were pretextual – or in other words – meant to hide the fact that she was actually terminated for off-duty sexual conduct. However, this would be a factual issue that would need to be decided by a jury.

Law enforcement officers and other public employees surrender some privacy rights in exchange for employment. However, this case closely examined the amount of privacy officers have in their private off-duty sexual conduct. The court relied on a previous ruling in *Thorne v. City of El Segundo* (9th Cir. 1983) 726 F.2d 459, which established a constitutional right not to be fired for off-duty sexual conduct unless there was proof of a "negative impact on job performance" as a result of the off-duty conduct.

SYMPATHY STRIKES MUST BE WAIVED EXPLICITLY

By Yonatan Moskowitz

In a recent case filed against the City and County of San Francisco, the Public Employment Relations Board (PERB) held that unions can engage in "sympathy strikes" unless they explicitly waive their right to engage in these strikes. This means that, in this post-*Janus* era when public sector unions need to stand together more tightly, employers cannot stretch generic language in their contracts to forbid such solidarity actions.

Although employers can ask unions to explicitly waive the right to engage in "sympathy strikes" in negotiations, generic "no strike" clauses that already exist will not be stretched beyond their original meaning to be treated like waivers of all strikes.

This decision from PERB in *SEIU, Local 1021 v. City and County of San Francisco* (PERB Decision No. 2536-M), relied on the general principle that a union's decision to give up the critical right to strike must be clearly documented.

PERB also did not let San Francisco get away with its alternative argument: that it had inherent power to take away the right to strike in solidarity.

In the future, we expect more employers to approach their unions with proposals asking them to explicitly waive the

right to participate in sympathy strikes. Whether or not that is a right worth waiving will depend on the individual circumstances of each union and what is offered in exchange for the waiver. No matter whether a union decides to trade away this right or hold onto it as leverage, PERB has given something of value back to employees that they shouldn't take for granted in these unsettled times for labor relations.

UC IS NOT REQUIRED TO GIVE ITS OFFICERS DISABLED ON DUTY A CCW ENDORSEMENT

By Lina Balciunas Cockrell

In the case of *Jacobs v. Regents of the University of California* (2017) 13 Cal.App.5th 17, the Court found that University of California ("UC") peace officers who receive "Duty Disability Income" ("DDI") pursuant to the UC's retirement plan are not considered "retired" for the purposes of entitlement to a retired identification card and concealed weapons ("CCW") endorsement pursuant to the Penal Code.

Various provisions of the Penal Code provide that an "honorably retired" peace officer is entitled to a retired identification card with an endorsement that allows the holder to legally carry a concealed firearm. Such "honorably retired" officers include, pursuant to Penal Code section 16690, a "peace officer who has qualified for and accepted a service or disability retirement."

The UC has a benefits plan that provides members in eligible safety classifications who become disabled arising out of and in the course of duty may receive DDI, which differs from retirement benefits in certain ways – including that the member does not need to be retired in order to receive DDI, and the member can continue to receive service credit while receiving DDI. DDI can be collected for life, and the member need not be separated from employment in order to receive DDI.

As a result, the Court concluded that UC's plan distinguishes officers who receive DDI from officers who are retired. The Court further rejected the argument that an entitlement to DDI is the "functional equivalent" of a disability retirement, noting that nothing in the Penal Code section 16690 provides for functional equivalency to being a service or disability retirement. As a result, the UC has no mandatory duty to issue its disabled members receiving DDI a retired identification card and CCW endorsement.

This holding is likely limited to its facts, that is, UC peace officers who become disabled arising out of their duties, but are not retired. This is because of the uniqueness of the UC system, including its benefits plan. The Court acknowledged the UC's constitutional authority to organize and govern the university system, with even the Legislature having little authority over UC, and that "'the [UC] is intended to operate as independently of the state as possible.'"

BLANKET BAN ON SHIFT TRADES AS RETALIATION FOR PROTECTED ACTIVITY PROHIBITED BY PERB

By Kimberly Chapman

The California Public Employment Relations Board (PERB) recently concluded that the County of Santa Clara interfered with employee rights. The Santa Clara County Correctional Peace Officers' Association filed an unfair practice charge against the County. The Union argued that the County violated the MMBA by imposing a blanket ban on a union activist's ability to participate in shift trading. PERB found that the County maintained an unlawful motive for this ban, without an adequate business reason for it. Thus, the actions of the County were characterized as retaliatory in nature.

In order to demonstrate that an employer discriminated or retaliated against an employee in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a), the charging party must show that: (1) the employee exercised rights under the MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights.

In this case, the County was well aware of the union activist's involvement in the union and had knowledge of the protected activities that he engaged in. PERB applied a reasonableness test to determine if an adverse action was taken. This test is articulated as "whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment*." In this case, a Captain sent an email to all sergeants and lieutenants prohibiting the union activist from engaging in shift trades. It was a blanket ban with no time limitations and arguably violated provisions of their MOU.

Whether or not the motive of the County is unlawful "can be established through circumstantial evidence and inferred from the record as a whole." The timing of the adverse action to the protected activity is an important part of examining this nexus. However, one or more of the following additional factors must be established to demonstrate this nexus. Those factors are: "(1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists; or (7) any other facts that might demonstrate the employer's unlawful motive."

In the case before PERB, the blanket ban was implemented one day after the union activist had failed to completely "repay" a traded shift because he took union release time for part of the shift. Furthermore, in finding a nexus between the protected activity and the alleged retaliation, the County departed from its established procedures. Typically, when an employee fails to complete a shift trade, they are verbally counseled. Thus, PERB concluded that the County had an unlawful motive for imposing the blanket ban.

ATTORNEYS' FEES AFTER SETTLEMENT OFFERS FOR POBR CASES

By Yonatan Moskowitz

The Court of Appeal in *Sviridov v. City of San Diego* announced a decision ordering the plaintiff to pay a substantial portion of the City's attorneys' fees. This decision will make it easier for departments and employers to shift their costs and fees onto plaintiffs in Peace Officer Bill of Rights Act (POBR) actions.

Until this case came down, plaintiffs asserting POBR rights generally believed they could only be punished financially for bringing these suits if the suits were "frivolous" or "for an improper purpose." (Section 3309.5.) Only if a judge decided that this was the case could the employer receive some of its attorneys' fees and costs.

But there is another fee shifting statute that applies to civil cases generally (Code of Civil Procedure section 998). This law *requires* plaintiffs to pay some portion of defendants' attorneys' fees in certain circumstances. If the plaintiff rejects a reasonable settlement offer and the ultimate result of the lawsuit is less favorable to the plaintiff, this law punishes the plaintiff for rejecting the offer, exercising their rights, and forcing all parties to see it through to the end. The law puts the plaintiff on the hook for the defendants' attorneys' fees accrued after that offer was made.

The *Sviridov* decision specifically decided that the special fee-shifting language of POBR did not replace the more general section 998 rule. Instead, the Court held that the POBR fees were merely *additional* awards available above and beyond the general civil fee shifting section 998 awards.

In the end, this makes rejecting settlement offers in POBR actions more risky for plaintiffs. POBR plaintiffs who reject these offers may now be on the hook for attorneys' fees *even if they win* so long as the ultimate result is not as– or more–favorable to them than the offer was. This will reduce POBR plaintiffs' leverage in lawsuits, and we expect it to encourage more, smaller, earlier settlement offers by defendants in these cases.

Across the Country

K9 PROGRAM EMPLOYEES CAN STILL BLOW THE WHISTLE

By Yonatan Moskowitz

Despite their manager's best efforts, members of the K9 program in Nevada can still call the legislature to blow the whistle on problems they see in the program. Not all department policies prohibiting certain kinds of speech violate the First Amendment, but those similar to the policy at issue in *Moonin v. Tice* clearly cross the line.

In this case, the manager issued a policy that was broad enough to prohibit members of the K9 program from calling legislators to let them know that official information the public was receiving was incomplete. It applied to speech made as a private citizen and expressions of opinions about the K9 program generally.

As the Ninth Circuit held, the policy was essentially put in place not to protect operational information and planned deployments, but to protect the department managers from embarrassment and inquiring calls from watchdogs. According to the policy, the only person who was able to make the call as to whether speech was OK was the manager, and the only standard that the manager applied was whether the speech was "appropriate."

That is a policy ripe for abuse, and it created an enormous chilling effect on all kinds of First Amendment protected speech.

But the court went further than courts normally do in these situations. The manager's policy violated such clearly settled First Amendment law the manager could not claim "qualified immunity" (which protects public safety employees for acts they take in their official capacity in many circumstances), and the case could go ahead against the manager in their personal capacity.

POLICE UNION MAY PROCEED WITH LAWSUIT REGARDING OFFICERS' PRIVACY RIGHTS RELATED TO CELL PHONES

By Matthew Taylor

In a win for police officer privacy rights, in *Port Authority Police Benevolent Association, Inc. v. Port Authority of NewYork and New Jersey* (S.D. NEW YORK, SEPT. 29, 2017) WL 4403310, a federal district court denied defendant Port Authority of New York and New Jersey Police Department's motion to dismiss plaintiff union's claims that the Department violated probationary police officers' rights against warrantless searches of their personal cell phones. After

graduating from the academy, probationary police officers ("PPOs") partied into the night allegedly causing property damage and violence, and inappropriately touching bar patrons and employees. During the party, the PPOs used a cell phone app to communicate with one another in a private chat room.

An investigation ensued, and the supervising lieutenant warned the PPOs that if they did not cooperate with the investigation, they would face termination. The Department's investigators reviewed the PPOs' conversations from the private chat room by accessing the PPOs' personal cell phones; however, the record shows that the PPOs were never informed of their right to refuse the searches. While the PPOs did consult with their union representatives, they believed that if they did not hand over their cell phones, the Port Authority would terminate them.

The court concluded that a reasonable jury could find that the PPOs' "consents" to the searches were coerced based on the perceived threat of termination. Key to this conclusion was that the PPOs were never informed of their right to refuse the searches.

The court also found that these warrantless searches were not protected as "work-related" searches, which generally involves a search "of those areas and items that are related to work and are generally within an employer's control." While under certain facts courts have allowed "work-related" searches of employees' bags, purses, and/or homes, those cases involved prior notice to the employees that they would be subject to such searches. Such prior warnings did not occur here.

MANDATORY ANNUAL MEDICAL EXAMINATIONS RULED UNLAWFUL UNDER THE ADA

By Teal Miller

In *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey* (2017) 283 F.Supp.3d 72, a federal court in New York ruled that blanket policies requiring police officers to submit to annual medical exams are unlawful under the Americans with Disabilities Act ("ADA). However, a department can require specific groups of officers to submit to medical examinations if the department shows a legitimate business need.

In order for an employer's policy requiring regular medical examinations to be legal under the ADA, the employer must show that (1) the purpose of the policy is vital to its business; (2) the class or group of employees affected by the policy is defined based on grounds consistent with the business necessity; and (3) the policy genuinely serves the business necessity and the examination is no broader or more intrusive than necessary. This test applies to policies requiring yearly medical exams or exams as a result of an employee being injured or sick.

In this case, the Port Authority of New York and New Jersey had a policy that required all Port Authority police officers to submit to medical examinations in three situations: (1) an annual medical examination; (2) officers on leave for illness or injury not sustained on the job were required to report to the Office of Medical Services on the sixth day of absence, if possible, for evaluation; and (3) periodic fitness-for-duty exams if the officer was absent because of an on-duty injury.

The court found that the yearly medical exam which included a questionnaire and a full physical consisting of blood work, kidney and liver function tests, chest X-rays, urinalysis, vision test, hearing test, an electrocardiogram, and a hernia exam violated the ADA. Specifically, the court found that while the yearly medical exam did have a purpose vital to the business of the Port Authority – i.e. ensuring officers are fit to perform their public safety duties – it was too broad because it included all police officers of every rank, regardless of the duties they were assigned, and the physical exam itself was more intrusive than necessary.

Further, the court found that requiring police officers who have been out on leave for more than six days for injuries or illnesses not sustained on the job to report to the office of Medical Services was unlawful under the ADA, ruling that the Port Authority's desire to reduce sick leave and overtime costs was not a legitimate business necessity. This "mere expediency" was not sufficient to justify the policy.

However, the court found that requiring police officers injured on the job to report to the Office of Medical Services was lawful under the ADA because there was a business necessity, the group of officers affected was sufficiently based on the business necessity, and the exam was limited to the complaints and medical issues arising from the injury.

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